

DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

57044

FILE: B-184647

DATE: September 24, 1975

MATTER OF: Arden Tree Farms; Contract Modification

97422

DIGEST:

Timber sale contract which, but for inadvertent omission at time of first extension, would have included Emergency Rate Redetermination provision, may be modified to retroactively incorporate such provision since provision should have been included under terms of Forest Service directive and contract section B8.31 provides for modification of contract to include provisions which are in general use by Forest Service.

The United States Forest Service (USFS) has forwarded to our Office through the Department of Agriculture a request by Arden Tree Farms, Inc. (Arden), of Colville, Washington, for reformation of Kerry Creek Timber Sale Contract No. 00504-6 retroactive to October 1, 1973, to include contract provision C3.34, Emergency Rate Redetermination after Extension.

The original Kerry Creek Timber Sale contract was entered into between the USFS and Arden on December 4, 1969, with a termination date of October 1, 1973. At the time of termination, such contracts may be extended upon application of the purchaser and concurrence by the USFS. Prior to an extension, a unilateral rate redetermination is made by USFS to ascertain the current value of the remaining timber. If current values exceed contract values, the sale is extended at the higher rates which then apply throughout the extension period.

To provide relief in those cases where a purchaser's contract has been extended at a rate considerably higher than that of the original contract and the market price has subsequently dropped substantially, making the sale commercially unprofitable, the USFS by Emergency Directive No. 10, dated September 16, 1971, made provision for establishing emergency rate redetermination procedures coincident with extension actions. The directive included an enabling provision, C3.34, which was to be included whenever contracts were extended at rate of \$5 per thousand board feet, or more, higher than rates in effect immediately prior to the time of extension. The provision is as follows:

"C3.34 - Emergency Rate Redetermination after Extension (9/71). If upon application of Purchaser, Forest Service determines that, because of general changes in market or other economic conditions since the last rate redetermination, the weighted-average difference between the estimated selling value and estimated production costs, without allowance for timber payment, is less than the weighted average of the most recent redetermined rates, Forest Service shall redetermine rates under B3.31. Redetermined rates shall be applied under B3.12 to timber scaled subsequent to Purchaser's application and prior to any subsequent rate redetermination. In no event, however, shall rates be established which are lower than the contract rates in effect immediately prior to the termination date from which the last extension was granted."

Arden's contract was extended for one year on October 1, 1973 at redetermined contract rates considerably higher than those of the original contract and based on the high timber products prices prevailing at that time. Under these conditions, the emergency directive made mandatory the insertion of the above emergency rate redetermination provision into Arden's contract. The provision, however, was inadvertently omitted.

The failure to insert the emergency rate redetermination provision was discovered by the USFS prior to a second extension of the contract in October 1974. We are advised that the purchaser and the USFS both realized that the pricing established at the first extension modification was difficult for the purchaser in a falling market and Arden requested that provision C3.34 be inserted into its contract. Due to a misunderstanding within the USFS the provision was not included by modification at the time of the second extension, although it was the intention and instruction of the Forest Service that the provision should have been added effective October 1, 1973.

Arden's contract contains section B8.31 which provides as follows:

"\* \* \*Forest Service agrees that upon request by Purchaser this contract shall be modified to provide for the exercise of any authority

hereafter granted by law, or Regulation of the Secretary of Agriculture if such authority is then generally being applied to Forest Service timber sale contracts. Any other contractual provision in general use by Forest Service, together with compensating adjustments, may be inserted herein by agreement." (Emphasis supplied.)

It appears that but for the inadvertent initial omission, the emergency rate redetermination provision would have been included in the contract and available to provide relief to the purchaser as intended. Under these circumstances, we are of the opinion that under section B8.31, supra, contract 00504-6 may be modified to incorporate section C3.34, Emergency Rate Redetermination after Extension, effective October 1, 1973. See B-168544, March 22, 1974, 74-1 CPD 140.

  
Deputy Comptroller General  
of the United States